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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-703

UNITED STATES OF AMERICA, APPELLANT

v.

FIRST NATIONAL BANCORPORATION, INC. AND THE FIRST NATIONAL BANK OF GREELEY

ON APPEAL TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

REPLY BRIEF FOR THE UNITED STATES

Appellees' lengthy briefs do not dispute the fact that bank mergers and acquisitions,[1] like mergers and acquisitions in other industries (compare *Kennecott Copper Corp.* v. *Federal Trade Commission*, C.A. 10, No. 71-1371, decided September 15, 1972), which eliminate from a designated geographic market significant

[1] For purposes of antitrust analysis, there is no material economic distinction between bank holding companies which own multiple banks and banking corporations which operate multiple branch offices. State law requirements, as much as anything else, determine what method of organization is used.

potential competition, violate Section 7 of the Clayton Act. Where the parties differ is with regard to the showing that the government must make in order to establish such a violation.

It is our submission, as explained in considerable detail in our main brief, that judicial appraisal under Section 7 of the competitive impact on the Greeley Area banking market of Bancorporation's entry by acquisition of the second largest banking corporation there (FNB Greeley) should be based upon objective factors: "whether, considering the structure of the market, the putative entrant's financial capability to enter independently, its economic incentive to do so, and the reasonable prospects for making such an entry successful, there exists a basis for entry which would be reasonably acceptable to prudent management, if entry by acquisition of a large market share was not available" (Gov't Br., pp. 29-30). We have already demonstrated in our main brief that the objective evidence in this record requires an affirmative answer to that question.

Appellees' response consists essentially of a frontal attack on the conclusion that the banking market in the Greeley Area is concentrated (see Gov't. Br., pp. 20-28, 47-49), and a collateral attack—based on testimony of the acquiring firm's officers denying any intent to enter *de novo* and on testimony of a federal banking official that he would not recommend the chartering of a new bank in the area—on the objective evidence showing that Bancorporation is a significant potential entrant into the market (see Gov't.

Br., pp. 36-44).[2] Our main brief answers most of these arguments.[3] We add only the following observations:

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[2] Appellees also argue (Br. 68-78) that even if the merger has the proscribed anticompetitive effects, they are outweighed by its alleged pro-competitive aspects. As explained in our principal brief (pp. 46-47), however, these contentions are to be considered under the " 'convenience and needs of the community to be served' " defense, but not in determining whether the government has shown anticompetitive effect. Since the district court dismissed the complaint because of its holding that the government had not proven anticompetitive effect and did not consider the "convenience and needs" defense, that issue is not properly before this Court.

[3] Appellees have challenged the district court's finding (J.S. App. A, pp. 41-43) that the relevant line of commerce for purposes of resolving the potential competition question is "commercial banking" (Br. 82-83). Their argument was fully considered by the court below and rejected "on the merits of the question [and] on the basis of positive law" (J.A. App. A, p. 42). This ruling is in line with the decisions of this Court. See *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 356; *United States* v. *Phillipsburg National Bank*, 399 U.S. 350, 360-361.

With reference to the relevant geographic market, appellees now contend (Br. 78-82) that the district court erred in choosing the so-called "Greeley Area" (J.S. App. A, pp. 43-47), rather than the City of Greeley. In the district court, however, they argued that all of "Weld County is the relevant area for measuring the effects of the merger" (J.S. App. A, p. 46). The government's position in the district court was that either the City of Greeley or the larger Greeley Area were appropriate geographic markets. After reviewing the evidence, the court found that the most relevant market of those proposed for testing the effect of the acquisition was the Greeley Area, "that is, the City of Greeley and its environs and satellite communities * * *" (J.S. App. A, p. 47). Appellees state no persuasive reason for disturbing this finding.

1. *Market concentration.* Appellees attempt to show that the Greeley Area market is not highly concentrated by a comparative reference to the number of banks in communities of similar size elsewhere in the country (Br. 32-37). They argue that "concentration" exists only when "the market in question has been preempted by fewer competitive entrants than could reasonably be accommodated within a given geographic market * * *" (Br. 32). Since the six banking organizations in the Greeley Area are said to exceed the number of banks generally serving comparable markets elsewhere, appellees conclude that we deal here with "a highly *un*concentrated market" (Br. 35).

This approach to market concentration misses the mark. It ignores market share figures, which this Court has consistently regarded as fundamental to a determination of anticompetitive effects. See *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 363; *United States* v. *Phillipsburg National Bank* 399 U.S. 350, 366-367. A market concentration ratio is defined "as the percentage of total industry sales (or * * * assets) contributed by the largest few firms, ranked in order of market shares." Scherer, *Industrial Market Structure and Economic Performance*, 50, 51 (1970). In the Greeley Area, the three largest (including FNB Greeley) of the six banking organizations have more than 90 per cent of all deposits (Gov't. Br., p. 47). That is the true measure of the economic structure of the market, and the one which this Court applied in *Phillipsburg* in holding that the market

there, which contained seven banks, was "already concentrated" because of the large percentage of the business done by the top firms (399 U.S. at 366-367).[4]

2. *Bancorporation as a potential entrant.* In our main brief, we discuss the objective factors showing that Bancorporation is a significant potential entrant as one of the few firms outside the Greeley Area with the ability and incentive to enter as a substantial competitor into the market (Gov't. Br., pp. 36-44).[5]

Appellees respond with the argument that, since "Greeley has had the lowest absolute growth of any Colorado community of 25,000 or more and * * * Bancorporation had no office in 11 of those 13 communi-

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[4] See also the discussion in our main brief at pp. 47-49.

[5] Appellees argue (Br. 46-50) that Bancorporation's status as a potential entrant makes it no different, as a competitive influence on the market, from anyone else who is free to enter by organizing a new bank. But this argument overlooks the fact that no individual group of businessmen without banking experience, substantial resources, and skilled personnel can hope to have the same impact on the Greeley market that independent or foothold entry by Bancorporation would have. As appellees point out (Br. 69), the combination of Bancorporation's $500 million in resources, its expert personnel and institutional experience would make it a most effective competitor in the Greeley Area. While permitting it to acquire FNB Greeley would further entrench the existing three-firm dominance of the Greeley market, as we have pointed out in our main brief (Gov't Br., p. 51) (and see *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568, 578-580; *General Foods Corp.* v. *Federal Trade Commission*, 386 F.2d 936, 945-946 (C.A. 3), certiorari denied, 391 U.S. 919), this would not be the case if Bancorporation's competitive ability were placed behind a new bank or a small bank in the Greeley Area; the effect of such entry would rather be to offset the existing domination of the three market leaders.

ties" (Br. 45), the Greeley Area was a relatively unattractive market to the acquiring holding company. Bancorporation, however, now operates banks in 4 of those 13 communities (Denver, Northglenn, Boulder and Colorado Springs); six others are in the Denver Standard Metropolitan Statistical Area ("SMSA"), where Bancorporation is the largest banking organization and operates five separate banks. Hence Greeley is one of only three cities (Pueblo and Fort Collins are the others) outside the Denver SMSA of significant size in which Bancorporation has no commercial banking office.

Moreover, Weld County—where the Greeley Area is located—is one of only four counties in the State with more than 50,000 population where Bancorporation does not operate.[6] The company is actively considering entry by foothold acquisition into Larimer County (Loveland) (PX6; App. 563-567), and has sought unsuccessfully to enter Pueblo County (56 Fed. Res. Bul. 731). Thus, Weld County, and more particularly the Greeley Area, represent one of the very few major population centers of the State not served by Bancorporation.[7] In the view of Bancorporation's concerted

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[6] Of the ten counties in Colorado with more than 50,000 population, five (Denver, Boulder, Jefferson, Adams and Arapahoe) are in the Denver SMSA, an area in which Bancorporation already has a major position. Bancorporation has recently entered El Paso County by foothold acquisition. *First National Bancorporation*, 58 Fed. Res. Bul. 493.

[7] Nor does the record support appellees' apparent effort to disclaim any interest by Bancorporation in the Greeley Area. The district court found that Bancorporation does trust busi-

effort to expand into new banking markets throughout the State (see also Gov't. Br., p. 7, n. 9 and pp. 25-26, n. 28), a comparison between the Greeley Area's growth rate and that of other communities in Colorado of similar size, is an inadequate basis for measuring the Greeley market's relative attractiveness to Bancorporation.[8]

Appellees' heavy reliance on testimony of the acquiring firm's officers, disavowing any intent to enter that market *de novo*, is equally misplaced.[9] We have

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ness in the area (J.S. App. A. 31-32; PX 37); and appellees do not dispute (Br. 24-27) that the acquiring company also solicits business (merchant accounts) in the area, makes large loans there and operates a mortgage-lending office in Greeley (which was recently spun off with certain other mortgage offices operated by Bancorporation to form the First National Bancorporation, one of the largest mortgage banking concerns in the State of Colorado, 58 Fed. Res. Bul. 596). Contrary to appellees' assertion (Br. 24), we do not contend that these activities establish "a presence" in Greeley; they do, however, demonstrate Bancorporation's continuing interest in the market and underscore its presence on the edge of the market as a potential competitor. Compare *Virginia National Bankshares*, 58 Fed. Res. Bul. 494, 495-496.

[8] Moreover, appellees' comparative analysis cannot erase the fact, as demonstrated in our main brief at pp. 9, 37, that the Greeley Area experienced substantial growth in the decade of the 1960's.

[9] This testimony does not address the question of a possible "foothold" entry by Bancorporation; accordingly appellees have sought to defend the decision below solely on the ground that the acquiring firm's officers stated that the holding company "would not enter Greeley by *de novo* charter * * *" (Br. 40).

The district court also discounted the possibility of a foothold acquisition by Bancorporation. Referring only to one of

already pointed out why such "subjective" testimony should be accorded little weight in evaluating the potential competition question under Section 7 (Gov't. Br., pp. 28-36).[10] Similarly, we explained in our main

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the three small commercial banks in the Greeley Area that could appropriately serve as a foothold (see Gov't Br., p. 11, n. 13), State Bank of Greeley, it observed that "the objective evidence presented * * * does not suggest that [an acquisition of that bank by Bancorporation] is or would be a likely possibility" (J.S. App. A, p. 50). The "objective evidence" alluded to was testimony by a Bancorporation witness indicating that State Bank of Greeley was unavailable because the owners insisted on unreasonable terms (App. 298). Recently, however, Central Colorado Bancorporation filed an application with the Federal Reserve Board to acquire State Bank of Greeley (application filed May 12, 1972; amended application filed June 12, 1972), and the Board published notice of its approval of the application on August 3, 1972 (37 Fed. Reg. 15533). The application was approved by the Federal Reserve Board October 3, 1972. Moreover, there still remain two small "foothold" banks in the Greeley Area available to Bancorporation. The fact that they are respectively located at 8 miles north and 5 miles south of the City of Greeley hardly makes them "out-of-the-way" for Greeley customers, as appellees seem to suggest (Br. 12, n. 23). Nor are appellees accurate in their apparent contention that the district court was unaware of the existence of these smaller banks (see J.S. App. A, p. 33).

[10] Despite management's stated reluctance to enter the Greeley Area *de novo*, this method of entry had been the sole means of expansion by the principals of Bancorporation's lead bank, FNB Denver, prior to formation of the holding company (see Gov't. Br., p. 6; App. 286). Certainly *de novo* entry into the Greeley Area remains a viable alternative for Bancorporation if it can not acquire FNB Greeley.

Indeed, on one occasion Bancorporation considered entering a market by chartering a bank there. Toward the end of 1969, Bancorporation officials discussed with the Regional

brief (Gov't. Br., p. 41) why the district court improperly gave controlling weight to the testimony of the Regional Administrator of National Banks that he could foresee no need for a new national bank in Greeley for "upward to five years" (App. 330).[11]

The unreliability of abstract opinions given by reg-

Administrator of National Banks the possibility of applying for a charter for a new bank in the Montbello Shopping Center, a suburb of Denver (App. 509-510, 293, 351). Bancorporation subsequently applied to the Board of Governors of the Federal Reserve System to acquire the existing bank in Montbello, which had opened in the interval, but the Board denied the application (App. 352; DX 52, App. 1750). Bancorporation then filed with the Comptroller of the Currency an application to form a new national bank there, but, after a hearing, the Comptroller denied it (App. 353).

[11] When a bank enters a market *de novo* or through a different acquisition, after a proposed acquisition has been rejected, the intervening interval may vary considerably. In Colorado, both Bancorporation and United Bankshares entered the Colorado Springs market within a year after being frustrated in their efforts to buy market leaders. *United Banks of Colorado*, 58 Fed. Res. Bul. 58; *First National Bancorporation*, 58 Fed. Res. Bul. 493. But in New York State, by contrast, it took almost ten years for Manufacturers and Traders Bank of Buffalo to enter New York City as an actual competitor. See *First Empire State Corp.*, 58 Fed. Res. Bul. 582 (original combination denied in 1962—*Morgan New York State Corporation*, 48 Fed. Res. Bul. 567). In 1967, Virginia National Bank sought unsuccessfully to enter the Richmond, Virginia, area, by acquisition of a local market leader, Central National Bank. *Allied Bankshares Corporation*, 53 Fed. Res. Bul. 763. Virginia National has, however, recently announced plans to enter this market through a foothold acquisition. See Moody's, *Bank and Finance*, Vol. 44, p. 1464, September 19, 1972.

Such intervals between proposed and actual entry thus do not alter the potential-competitor-status of those firms on the edge of the market during that period.

ulatory officials as to whether they would or would not charter a new bank, not made in connection with any actual application therefor, is further shown by the recent experience in Greeley. Unlike the Regional Administrator of National Banks, the State Banking Commissioner in this case expressed no opinion on whether he would authorize a new bank in that area, for which no application was then pending (App. 491). Less than twelve months after such testimony, the State Banking Board granted a charter to another Colorado bank holding company (Colorado National Bankshares) to organize a new bank in Greeley (Appellees' Br., p. 4, n. 6).[12] This action further supports the argument in our main brief that theoretical statements by bank regulatory officials provide no sound basis for predicting what the officials would do when presented with an actual application based upon specific facts.[13]

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[12] Since Colorado National Bankshares is not forming a national bank, it is not required also to obtain approval for the new charter from the Comptroller of the Currency.

[13] The statement by the Regional Administrator that he would not recommend the chartering of a new bank in Greeley was irrelevant to the question whether Bancorporation could enter the Greeley market by making a foothold acquisition, or by having its principals organize a new state bank and then acquiring the latter's stock, since such acquisitions would be subject to the regulatory approval not of the Comptroller of the Currency, but of the Federal Reserve Board. Compare *First National Bancorporation*, 58 Fed. Res. Bul. 493, *United Banks of Colorado*, 58 Fed. Res. Bul. 58 (entry into Colorado Springs by foothold acquisitions).

CONCLUSION

The judgment of the district court should be reversed and the case remanded for further consideration under correct criteria.

Respectfully submitted.

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